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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1257

CLARKE RAYMOND MOORE and JOHN BERNARD SPELZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered June 12, 1972, and (2) granting the petition. As grounds for this motion, petitioners state the following:

1. THE VIOLATION OF THE PROCEDURAL PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

Regarding petitioners argument that Exhibit 11 should have been suppressed, still another of the Court of Appeals has entered the conflict over the ministerial nature of the return requirements of Rule 41(d), Fed. R. Crim. P., *United States v. Kennedy*, 457 F.2d 63, 67 (10th Cir. 1972). Regardless of their ministerial form, errors in the return of search warrants must invalidate the search and seizure to the extent that those errors create a substantive prejudice to the defendants. The effect of the failure to list Exhibit 11 in the instant case was substantively prejudicial (see argument C in Petition, page 15); the same prejudicial effect that was caused by the failure to make a return in *Murby v. United States*, 293 F. 849 (1st Cir.).

The Solicitor General erred in his assertion that *Murby v. United States, supra*, was not in conflict with the decision below. The *Murby* case established the rule that although the return requirements of the Espionage Act were ministerial, when the non-compliance has a substantive effect, it renders the seized evidence inadmissible. Under that rule, Exhibit 11 in the present case should not have been admitted into evidence. Petitioners have thus been denied their constitutional right to be protected against unreasonable searches and seizures. That right could only be protected by enforcement of the provisions of Rule 41(d).

2. THE DECISION OF UNITED STATES v. BAILEY, 458 F.2d 408 (9TH CIR., DECIDED MARCH 21, 1972, REHEARING DENIED JUNE 1, 1972).

On March 21, 1972, the day prior to the filing of the petition for a writ of certiorari in the instant case, the Court of Appeals for the Ninth Circuit decided the case of *United States v. Bailey, supra,* which reaffirms the principle announced in this Court's decisions in *Nathanson v. United States,* 290 U.S. 41 (1933); *Giordenello v. United States,* 357 U.S. 480 (1958); *Aguilar v. Texas,* 378 U.S. 108 (1964); *Spinelli v. United States,* 393 U.S. 410 (1969); *Whiteley v. Warden,* 401 U.S. 560 (1971); *Harris v. United States,* 403 U.S. 573 (1971), and which decision conflicts with the opinion rendered by the Sixth Circuit in this case. It is submitted by the petitioners that the Sixth Circuit erred in its application of the basic concept formulated in this Court's decisions cited above and reaffirmed by *United States v. Bailey, supra.*

The applicable principle is that the affidavit submitted to the magistrate in support of a search warrant must disclose the underlying factual circumstances that are offered to support the conclusions of the affiant. This is to insure that a neutral assessment of the validity of the conclusions is made by the magistrate, a person independent of the adversary affiant.

This is the concept which petitioners submit was misapplied in the instant case (see argument A in Petition, page 17). Both the opinion of the Sixth Circuit and the dissent in *United States v. Bailey,*

supra, fail to incorporate this vital criterion to the validity of a search warrant. The continued misunderstanding of this concept, and its application, should call for a re-evaluation of the denial of certiorari.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Dated, San Francisco, California,
June 30, 1972.

Respectfully submitted,
ANDRE T. LABORDE,
ROBERT A. KANTOR,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

As counsel for the petitioners, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

ANDRE T. LABORDE,
ROBERT A. KANTOR,
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